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Walkden-Brown, Jackson; Stevenson, Lindsey

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**Preparing for Practice: Clinical Legal Education Through the Lens of Legal Education Discourse**

**Jackson Walkden-Brown\* and Lindsey Stevenson-Graf\*\***

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\* Assistant Professor, Centre for Professional Legal Education, School of Law, Bond University.

\*\* Senior Teaching Fellow, Centre for Professional Legal Education, School of Law, Bond University.

## **Abstract**

Australian legal educators have been singing the praises of clinical legal education loud and clear in recent years. Moreover, a significant percentage of Australian law schools have introduced diverse clinical education programs. While it is widely accepted that clinical subjects are a welcome addition to the modern law student experience, it is contended that there are varied perspectives on the appropriate function and design of clinical subjects and programs. The purpose of this paper is to conceptualise these diverse perspectives by examining clinical legal education through the lens of legal education discourse. Legal education is characterised by distinct and competing discourses with respect to the nature of law teaching, including doctrinalism, vocationalism, corporatism, liberalism, radicalism and educationalism. The first part of the paper provides an overview of Foucauldian discourse theory and a description of each legal education discourse. The second part of the paper provides an analysis of clinical legal education in the context of each discourse, illustrating the distinctive features of CLE that are aligned and misaligned with the fundamental tenets of each discourse. An introduction to legal education discourse serves to provide law teachers with a sense of objective clarity regarding the competing perspectives that characterise typical law school debates on matters of pedagogy, such as clinical legal education.

## I Introduction

Clinical legal education (CLE) programs are ripe with learning opportunities. CLE students develop a deeper understanding of legal doctrine and witness the interaction of law and society first-hand, at the same time as acquiring invaluable practical skills to assist with their transition into legal practice. The proliferation of CLE opportunities in Australia in recent years demonstrates how this unique and multifaceted teaching mode has become increasingly attractive to students and universities alike. There were only 13 CLE subjects offered Australia-wide at the turn of the century.<sup>1</sup> Currently, well over half of the law schools in Australia include a CLE subject in their curriculum, with some offering more than ten distinct CLE opportunities.<sup>2</sup> Contemporary CLE programs are addressing an expanding range of legal issues and assisting a greater diversity of clients. There is no doubt that CLE has become a staple on the Australian law school agenda and will continue to play a pivotal role in the education of law students into the future.

Australian CLE scholarship universally advocates the importance of clinical education to the modern law student experience. The relevant discourse is extensive and, as one might expect, composed predominantly by scholars with first-hand experience in the coordination and supervision of clinical subjects. Rather than engaging with the discourse of those with a special interest in CLE, the authors wanted to conceptualise the perspectives that exist amongst law academics and executives that are not necessarily involved in teaching and researching CLE. Specifically, the discourse of interest is that which might occur in a typical law faculty meeting in which a broad range of academics and executives are tasked with conceptualising their faculty's future plans regarding CLE. Those with experience in attending law faculty planning sessions will attest to the diverse range of learning and teaching ideologies on display in this context. Despite the general supportive undertone that undoubtedly exists in any strategic discussion concerning the provision of clinical opportunities for law students, it is contended that CLE is not immune from the war of words that typically characterises faculty debate over matters of pedagogy.

Illustrating varied perspectives regarding CLE necessarily requires an enquiry into the factors relevant to our understanding of the notion of 'teaching law'. If indeed there are wide-ranging views on the role and function of CLE, what then might be the primary points of differentiation? To answer that question, one must consider ideas relating to both *what* law should be taught and *how* law should be taught. Also relevant is an analysis of the *outcomes* sought by legal educators.<sup>3</sup> One might assume that the teaching of law rests upon a relatively consistent and stable body of knowledge and practises. The reality, however, is that the discipline of legal education is characterised by distinct and competing discourses with respect to the nature of law teaching, namely: doctrinalism, vocationalism, corporatism, liberalism, radicalism and educationalism.<sup>4</sup>

The first part of this paper serves as an introduction to the ongoing battle of ideologies existing within legal education by way of a brief overview of Michel Foucault's ideas relating to power, knowledge and discourse. The six legal education discourses are described and some fundamental aspects of their co-existence are explored. Following an account of the relevant context and standard design of CLE subjects in Australia, the second part of the paper serves as an examination of CLE through the lens of each of the six legal education discourses. The purpose of this exercise is to identify and examine the distinctive features of CLE that are aligned and misaligned with the fundamental tenets of each discourse. While each discourse fosters different ideas regarding the values and goals of law teaching, it is argued that, with the possible exception of doctrinalism, CLE can address all of them in different ways. A primary objective of

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<sup>1</sup> Kingsford Legal Centre, Faculty of Law, University of New South Wales, *Guide to Clinical Legal Education Courses in Australian Universities* 1998 (1998) cited in Jeffrey Giddings, 'A Circle Game: Issues in Australian Clinical Legal Education' (1999) 10(1) *Legal Education Review* 34, 37.

<sup>2</sup> See Kingsford Legal Centre, Faculty of Law, University of New South Wales, *Clinical Legal Education Guide 2016-2017* (2017) <[http://www.klc.unsw.edu.au/sites/klc.unsw.edu.au/files/2676%20CLE%20guide\\_WEB.pdf](http://www.klc.unsw.edu.au/sites/klc.unsw.edu.au/files/2676%20CLE%20guide_WEB.pdf)>.

<sup>3</sup> Nickolas James, *Power-Knowledge and Critique in Australian Legal Education 1987-2003* (PhD Thesis, Queensland University of Technology, 2004), 285-6.

<sup>4</sup> This proposition is a central tenet in Nickolas James' doctoral thesis. See James, above n 3, 285-93, for a detailed explanation.

this paper is to elucidate the value of examining features of Australian legal education, such as CLE, through the lens of legal education discourse. It is contended that an awareness of the six discourses and the power strategies employed by each provides law teachers with a sense of objective clarity regarding how matters of pedagogy, such as CLE, are debated in legal academia.

## II Foucauldian Discourse Analysis<sup>5</sup>

### A Power, Knowledge and Discourse

The work of influential French intellectual Michel Foucault was exceptionally diverse. While most often referred to as a philosopher, he is also a historian, social theorist, political activist, philologist and literary critic. Foucault's ideas were influential across a multitude of disciplines, including, most notably, philosophy, psychology, politics, cultural studies, sociology, and literary studies.<sup>6</sup> He is best known for his theoretical conception of *power* and *knowledge* and the manner in which they are used as instruments of control in Western social institutions.<sup>7</sup> Foucault emphasised the close relationship between them by coining the phrase 'power-knowledge'. This expression is often misunderstood as meaning 'knowledge is power'. Foucault's interests lay in unravelling the complex relations between knowledge and power, but he never professed that they are one and the same. Rather, Foucault insisted 'knowledge is always an exercise of power and power always a function of knowledge'.<sup>8</sup> In other words, the construction and propagation of knowledge always entails an exercise of power and an exercise of power always entails the construction and propagation of knowledge.<sup>9</sup>

When Foucault examined the various topics that interested him,<sup>10</sup> he was not concerned with the truth or fallacy of the statements that were made about the relevant topic. Whilst denying the universality of truth, Foucault asserted that truths were real and had significant effects on the broad range of social institutions that featured in his work. He sought to discover the way in which such truths emerged by studying the formation and emergence of discourses. Put simply, a discourse is an institutionalised means of communicating reality within a discipline or institution that defines what can be said and thought, and by whom.<sup>11</sup> Foucault was interested in the evolution of discourses within society, primarily regarding how the discovery and identification of discourses existing within any given institution or discipline facilitated a deeper understanding of the realities of the institution or discipline and the people, ideas and other phenomena existing within it. They allow us to better understand ourselves and our external environment, while also constructing that environment and those who are permitted to exist within it. For Foucault, discourses establish the platform upon which knowledge is constructed and power is exercised.<sup>12</sup> They do not result in the discovery of pre-existing core truths about the identity of relevant subjects, but rather they create those truths and the identities of the subjects through the forces of power-knowledge. In the words of Foucault, discourses are 'practices that systematically form the objects of which they speak'.<sup>13</sup>

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<sup>5</sup> This paper is the second in a series of publications that will examine various aspects of legal education through the lens of legal education discourse. On the basis that it is necessary for each publication to include an overview of Foucauldian discourse theory and legal education discourse, this section is a direct duplication of the same in Jackson Walkden-Brown, 'Digesting Discourse: How Animal Law Facilitates High Quality Legal Education' (2017) 27(1) *Legal Education Review* (Article 10) <<https://epublications.bond.edu.au/ler/vol27/iss1/10>>.

<sup>6</sup> For a useful summary of Michel Foucault's life and ideas, see Social Theory Re-wired, *Michel Foucault* (21 January 2016) <<http://routledgesoc.com/profile/michel-foucault>>.

<sup>7</sup> Ibid. See also Gavin Kendall and Gary Wickham, *Using Foucault's Methods* (Sage Publications, 1999) 47.

<sup>8</sup> For a detailed analysis of Michel Foucault's ideas regarding power and knowledge, see James, above n 3.

<sup>9</sup> Ibid.

<sup>10</sup> Foucault's interests were spread across a broad range of topics, including, amongst many others, insanity, discipline, selfhood, spirituality and sexuality.

<sup>11</sup> See James, above n 3, 13–20 for a detailed explanation of the various elements making up the definition of 'discourse'. See also Social Theory Rewired, above n 6.

<sup>12</sup> Michel Foucault, *The Will to Knowledge: The History of Sexuality I* (Allen Lane, 1978) 101.

<sup>13</sup> Michel Foucault, *The Archaeology of Knowledge* (Harper and Row, 1972) 49.

## B Legal Education Discourse

Although Foucault's influence in the discipline of law has been relatively limited, there are examples of legal scholars applying Foucauldian theory.<sup>14</sup> In the context of legal education specifically, Dr Nickolas James<sup>15</sup> has produced an extensive body of scholarship centered on the Foucauldian discourses existing within the sphere of legal education.<sup>16</sup> The central tenet of James' work is the idea that the discursive field of legal education is characterised by distinct and competing ideologies or discourses with respect to the nature of law teaching, including doctrinalism, vocationalism, corporatism, liberalism, radicalism and educationalism. James asserts that each discourse is 'simultaneously a form of knowledge and expression of disciplinary power within the law school', that is, a 'vector of power-knowledge'.<sup>17</sup>

Much of James' research in this area involves an examination of critique, a notion central to the teaching of law and a useful tool to illustrate the complex relationship between the legal education discourses. He contends that while most law teachers and scholars identify critique as the lifeblood of legal education, there is significant disparity in terms of how the concept is defined and employed in the classroom.<sup>18</sup> James describes the instability of critique as a product of power-knowledge: 'As a form of knowledge, each discourse accords critique a different meaning and a different emphasis. As an expression of power, each discourse is an attempt to normalise a particular approach to the teaching of law and to enhance the status of a particular type of legal scholar'.<sup>19</sup> Accordingly, James' research encourages a deeper level of reflection upon what critique is assumed to mean and how this might affect the way that one teaches law.

While a detailed explanation of the underlying power-knowledge interplay within each legal education discourse is beyond the scope of this paper, it is necessary to provide at least a brief overview. James explains that each discourse is a form of knowledge about the teaching of law:

Doctrinalism and vocationalism are concerned primarily with what is taught. Doctrinalism insists that the emphasis should be upon the teaching of legal doctrine and vocationalism insists that the emphasis should be upon the teaching of legal skills. Corporatism and educationalism are concerned primarily with how law is taught. Corporatism insists that law be taught efficiently and profitably and educationalism insists that law be taught in a way that facilitates student learning. Liberalism and radicalism are concerned primarily with the objectives of legal education. Liberalism insists that the purpose of teaching law is the inculcation of liberal values, and radicalism insists that the purpose of teaching law is to contribute to social and political change.<sup>20</sup>

Each discourse is also an expression of power. As previously stated, each discourse produces and privileges particular roles within the law school and promotes the universalisation of a particular approach to the teaching of law. As a means of clarification, James conceived the

<sup>14</sup> See James, above n 3, 12–13 for a list of examples in which Michel Foucault's work has been used within the discipline of law.

<sup>15</sup> BCom LLB LLM Phd, Executive Dean and Professor of Law, Faculty of Law, Bond University, Australia.

<sup>16</sup> See, eg, Nickolas James, 'Law and Power: Ten Lessons from Foucault' (2018) 30 *Bond Law Review* 31; Nickolas James, 'More than merely work-ready: Vocationalism versus professionalism in legal education' (2018) 40(1) *University of New South Wales Law Journal* 186; Nickolas James, 'How Dare You Tell Me How to Teach: Resistance to Educationalism within Australian Law Schools' (2013) 36(3) *University of New South Wales Law Journal* 779; Nickolas James, 'The Marginalisation of Radical Discourses in Australian Legal Education' (2006) 16 *Legal Education Review* 55; Nickolas James, 'Liberal Legal Education: The Gap Between Rhetoric and Reality' (2004) 1(2) *University of New England Law Journal* 163; Nickolas James, 'Expertise as Privilege: Australian Legal Education and the Persistent Emphasis Upon Doctrine' (2004) 8 *University of Western Sydney Law Review* 1; Nickolas James, 'Why Has Vocationalism Propagated so Successfully in Australian Law Schools?' (2004) 6 *University of Notre Dame Australia Law Review* 41; Nickolas James, 'Australian Legal Education and the Instability of Critique' (2004) 28 *Melbourne University Law Review* 375; Nickolas James, 'The Good Law Teacher: The Propagation of Pedagogicalism in Australian Legal Education' (2004) 27(1) *University of New South Wales Law Journal* 147; and Nickolas James, 'Power-Knowledge in Australian Legal Education: Corporatism's Reign' (2004) 26(4) *Sydney Law Review* 587.

<sup>17</sup> Nickolas James, 'Australian Legal Education and the Instability of Critique' (2004) 28 *Melbourne University Law Review* 1, 378–9.

<sup>18</sup> Ibid 375.

<sup>19</sup> Ibid.

<sup>20</sup> James, above n 3, 285–6.

following representation of the teacher/student dynamic shaped by each discourse: doctrinalism creates the specialist teacher and the indoctrinated student; vocationalism creates the technician teacher and the employable student; corporatism creates the administrator teacher and the marketable student; liberalism creates the philosopher teacher and the ethical student; radicalism creates the radical teacher and the activist student; and educationalism creates the good teacher and the good student.<sup>21</sup>

### III Clinical Legal Education and Discourse

#### A Current Context for Australian Clinical Legal Education

The term 'clinical legal education' has been defined in myriad ways and remains a contested phrase.<sup>22</sup> At its simplest, CLE is 'a pedagogy that places students in real-life environments'.<sup>23</sup> It is a type of experiential learning in which students have direct access to the legal problems of real people under the supervision of qualified legal practitioners.<sup>24</sup> CLE has been an integral part of the Australian legal education landscape for many decades. The first Australian CLE subject was offered by Monash University in 1975. The subject was offered in partnership with the Springvale Community Legal Centre and emerged out of the community legal centre ('CLC') movement in the 1970s.<sup>25</sup> In that period, CLCs were established in Victoria, New South Wales and Queensland in the hope of assisting the most vulnerable Australians with their legal matters. The subsequent two universities to offer clinical law subjects (La Trobe University in 1978 and the University of New South Wales in 1977) also relied on relationships with CLCs to facilitate student learning.<sup>26</sup> Accordingly, the initial focus of subject-based experiential learning in Australian law schools was social justice and community service, the core business of CLCs.<sup>27</sup>

The 1987 Commonwealth Tertiary Education Commission report regarding Australian legal education (typically referred to as the 'Pearce Report') based its extensive set of suggestions regarding the reform of legal education on the perceived lack of commitment by law schools to teaching and student dissatisfaction with the intellectual rigour of their law studies.<sup>28</sup> The Pearce Report paid little attention to the educational value of CLE and focused more on 'its contribution to skills development'.<sup>29</sup> At that point, legal education appeared to be the 'odd one out' as a discipline that had not emphasised clinical training as central to the educational experience.<sup>30</sup> However, as the number of Australian law schools rapidly increased subsequent to the 1987 reforms to the university sector, a gradually expanding interest in experiential learning was evidenced by the increase of CLE elective subjects offered at Australian universities.<sup>31</sup>

There were 13 CLE programs listed in the Kingsford Legal Centre *Guide to Clinical Legal Education in Australian Universities 1998*. These included primarily generalist programs held on-site and/or in coordination with placement opportunities at CLCs. While the CLE movement was still in its infancy, CLE offerings were becoming increasingly popular and were used by law schools as a point of differentiation to attract prospective students.<sup>32</sup> By the turn of the century,

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<sup>21</sup> Ibid 286.

<sup>22</sup> Adrian Evans et alia, *Australian Clinical Legal Education: Designing and operating a best practice clinical program in an Australian law school* (Australian National University Press, 2017) 39.

<sup>23</sup> Ibid 41.

<sup>24</sup> Ibid 44-46. While some have asserted that CLE includes simulated legal practice, most scholars see exposure to real clients as the central defining characteristic of CLE.

<sup>25</sup> Jeffrey Giddings, 'Clinical Legal Education in Australia: A Historical Perspective' (2014) 3 *International Journal of Clinical Legal Education* 8.

<sup>26</sup> Ibid 11-14.

<sup>27</sup> Giddings, above n 1, 37.

<sup>28</sup> Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Committee* (Australian Government Publishing Service, 1987).

<sup>29</sup> Jeffrey Giddings, *Promoting Justice Through Clinical Legal Education* (Justice Press, 2013) 10.

<sup>30</sup> Jeffrey Giddings, 'Contemplating the Future of Clinical Legal Education' (2008) 17 *Griffith Law Review* 1, 15.

<sup>31</sup> Giddings, above n 1, 40.

<sup>32</sup> Giddings, above n 25, 18.

several law schools were offering specialist CLE subjects.<sup>33</sup> There continued to be a strong focus on social justice as clinics partnered with CLCs, legal aid commissions, courts, public interest law offices and private law firms.<sup>34</sup>

In 2010, the Australian Office for Learning and Teaching funded a project 'to develop a set of best practices for effective clinical legal education, and to assist in the renewal of University law curricula in Australia'<sup>35</sup> and in 2012, the finalised best practice recommendations were adopted by the Council of Australian Law Deans.<sup>36</sup> The initial marginalisation of CLE in Australian legal education had ceased and law schools could now confidently adopt nationally endorsed best practice methods when designing new CLE subjects or reinvigorating existing offerings.<sup>37</sup> In recent years, as student and market demand require practical experiences to ensure law students are workplace ready,<sup>38</sup> integrated skills programs have become a defining aspect for several law schools.<sup>39</sup> Existing CLE subjects support this initiative, and a shift in focus to legal skills for some faculties has provided an opportunity to link CLE subjects with the broader curriculum.

Currently, 25 of the 39 Australian law schools are listed in the *Guide to Clinical Legal Education 2016-2017* as offering a CLE subject.<sup>40</sup> More than half of the participating law schools offer more than one CLE subject.<sup>41</sup> University of New South Wales currently has the most extensive offering, with 14 clinical subjects available to students.<sup>42</sup> The offerings vary in subject matter, clientele, structure and delivery. While many clinical subjects continue to fall in the social justice sphere, CLE opportunities have diversified significantly in recent years, addressing an extensive range of legal areas and assisting broad and diverse sectors of the community.<sup>43</sup> For example, several clinics have been created in the last five years to assist small businesses with commercial matters or not-for-profit organisations with technological development.<sup>44</sup> Traditionally, these types of organisations would not have fallen within the scope of legal clinics that only assisted the most vulnerable.

## **B Standard Design Elements**

There is no standard blueprint for the structure and delivery of a CLE subject,<sup>45</sup> and the type of clinical subjects offered by a law school will depend on a variety of factors.<sup>46</sup> Clinical subjects operate both on campus (in-house) and externally. In-house clinics are generally funded internally

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<sup>33</sup> Ibid 20. Specialist CLE subjects included innocence projects, family law clinics and sexual assault clinics.

<sup>34</sup> National Pro Bono Resource Centre, *Information Paper: pro bono and clinical legal education programs in Australian law schools* (August 2004) 8.

<sup>35</sup> See the 'Learning and Teaching Repository' at <<http://www.olt.gov.au/project-strengthening-australian-legal-ed-clinical-experiences-monash-2010>>.

<sup>36</sup> Adrian Evans, 'Best Practices: Australian Clinical Legal Education' (2013) 47(3) *The Law Teacher* 421, 422.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid 421.

<sup>39</sup> For example, Bond University has a legal skills program 'to provide student[s] with an introduction to the skills and professional attitudes essential to the successful completion of their law program and subsequent practice of the law and related professions'. See Bond University, Faculty of Law, *Legal Skills Policy* <<https://bond.edu.au/files/1832/LAW206.pdf>>. Similarly, University of Tasmania is 'committed to practice-centric teaching and has embedded skills-based, experiential teaching and learning into core units through the degree'. See University of Tasmania, Faculty of Law, *Practice Centric Legal Teaching* <<http://www.utas.edu.au/law/left-quick-links/practice-model>>.

<sup>40</sup> Kingsford Legal Centre, above n 2.

<sup>41</sup> Ibid.

<sup>42</sup> University of New South Wales, Faculty of Law, *Clinics* <<http://www.law.unsw.edu.au/current-students/law-action/clinics>>.

<sup>43</sup> Giddings, above n 29, 10.

<sup>44</sup> For example, Bond University offers a Commercial Law Clinic and the University of Canberra offers a Small Business Legal Advice Clinic. Both clinics assist small businesses. The University of Melbourne offers a LawApps course that pairs students with not-for-profit organisations.

<sup>45</sup> Evans, above n 22, 39.

<sup>46</sup> Ibid 62. In this chapter, the authors assert that the factors used by universities in choosing a model are based on a 'combination of issues, including: learning objectives of the course; available resources, financial and physical; extent of control and supervision; potential partnerships/placements; types of legal work; and student's location and their numbers'.



and supervised by law academics, and might involve external elements such as guest presentations and excursions. A primary challenge of this configuration is that it is costly.<sup>47</sup> External clinics are ordinarily coordinated by a legal academic and supervised by a legal practitioner in the relevant external placement organisation, which is most often a CLC. The external organisation generally charges the university a supervision fee per student and works closely with the academic coordinator on all matters of design and delivery.<sup>48</sup> This model usually reduces costs, however, depending on the arrangement, the law school may have less control over the learning experience 'as the supervision is primarily the responsibility of the host organisation'.<sup>49</sup> At the same time, this environment is generally considered the best option for exposing students to the legal skills needed when working in a legal environment.<sup>50</sup>

Law schools that provide numerous clinical opportunities ordinarily offer a mix of generalist and specialist clinical subjects.<sup>51</sup> Generalist offerings aim to equip students with practical experience in a variety of legal subject areas. For example, a generalist clinical subject will often involve placement in a CLC where students participate in legal work that cuts across a broad range of areas.<sup>52</sup> In these subjects, student learning may focus primarily on acquiring practical skills rather than providing the opportunity to gain a deeper understanding of a specific area of law. Specialist offerings, on the other hand, focus on a specific area of the law, such as immigration law, environmental law or family law. With the increased focus on the inculcation of global perspectives, several law schools now offer specialist clinical subjects administered overseas by international organisations (ordinarily with a focus on international law).<sup>53</sup> Technology has also become an increasingly common specialist CLE focus area. For example, the innovative LawApps clinical subject at the University of Melbourne requires students to 'design, build and release a live legal expert system that can provide legal information to non-lawyers'.<sup>54</sup>

The learning objectives for CLE subjects generally include reference to knowledge, skills and attitudes that students are expected to attain. The 'knowledge' component generally relates to understanding the relevant area/s of law.<sup>55</sup> Generally, students must have completed a prerequisite subject and will build upon prior knowledge to deepen their understanding of the relevant core concepts of the law.<sup>56</sup> The 'skills' component generally relates to a variety of professional practice skills such as conducting effective legal research and analysis, writing clearly and contextually, and engaging with various members of the profession in a professional manner.<sup>57</sup> The 'attitudes' component generally requires adherence to high standards of

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<sup>47</sup> Ibid 54.

<sup>48</sup> It is important to note that there are numerous exceptions to these divisions. For example, several in-house clinics receive some external funding and supervision arrangements vary widely for external placements. See Adrian Evans et al, *Australian Clinical Legal Education: designing and operating a best practice clinical program in an Australian law school* (Australian National University Press, 2017) 50-1.

<sup>49</sup> Ibid 58.

<sup>50</sup> Ibid 97.

<sup>51</sup> For example, seven of the 14 clinics at University of New South Wales are specialist clinics and 8 of the 11 clinics at University of Queensland are specialist. Specialisations include: refugee law, environmental law, prison law, mental health law and family law. See Kingsford Legal Centre, above n 2.

<sup>52</sup> For example, the 'Clinical Legal Placement' subject at Bond University provides students with the opportunity to undertake a placement with the Gold Coast Community Legal Centre and South West Brisbane Community Legal Centre. Students are exposed to an array of legal fields at both of these CLCs.

<sup>53</sup> University of Queensland, University of Melbourne, University of Newcastle, and University of New South Wales all offer subjects enabling students to complete overseas externships with international organisations.

<sup>54</sup> Kingsford Legal Centre, above n 2. University of Melbourne is developing a 'suite of elective subjects that focus on disruption in the legal profession and develop the technical skills to navigate the complex ethical, legal and social implications of new technologies'. See <<https://law.unimelb.edu.au/study/jd#experience>>.

<sup>55</sup> See, for example, the Australian National University's 'Public Interest Law Clinic' (LAWS4284) in which students must be able to 'summarise and apply an advanced and coherent body of substantive legal knowledge about public interest law'.

<sup>56</sup> See Evans, above n 22, 72.

<sup>57</sup> See, for example, the University of Melbourne's 'Public Interest Law Clinic' (LAWS50116) in which students develop 'cognitive and technical skills relating to the generation and provision of legal advice and information attuned to clients' needs' and 'skills required for effective workplace performance, such as communication, time management, and office organisation'.

professionalism, including a commitment to learning and working independently, ethically, collaboratively and reflectively.<sup>58</sup> The learning activities for CLE subjects vary depending on context. As well as assisting individual clients, CLE students are often required to assist with research projects broadly related to the pursuits of the host organisation. The assessment design in CLE subjects is most often based on a combination of criteria that relate to the students' performance in general clinical matters (the *practical* component) and their performance in a traditional oral or written assessment task (the *academic* component).

James' categorisation of legal education discourse provides a useful tool to examine questions regarding *what* content is delivered in a CLE subject, *how* that content is delivered, and the *objectives* underlying the mode and substance of the delivery. CLE subject designers and supervisors influenced by doctrinalism might focus primarily on developing student understanding of legislation and cases relevant to the subject area, whereas those influenced by radicalism might focus primarily on issues of law reform with a view to encouraging students to contribute to social and political change. Our intention is not to assert that any particular approach to CLE design and delivery is, without exception, better than another. Rather, the purpose of this part of the paper is to demonstrate that the process of examining CLE through the lens of each legal education discourse is a useful way of obtaining a deeper understanding of where CLE sits on the legal education landscape. Further, this process is intended to equip readers with an appreciation for how an understanding of legal education discourse positively impacts the way one perceives the clashing of ideologies that typically defines law faculty debate over matters of pedagogy.

### **C Doctrinalism**

*Doctrinalism insists that the emphasis should be upon the teaching of legal doctrine. The indoctrinated student expects that legal education be about learning what the law is.*<sup>59</sup>

Doctrinalism is concerned with a 'black letter' approach to the teaching of law. It privileges legal rules and principles and excludes, or at least resists, the more contextual, theoretical and critical perspectives. Legal education is the vehicle for transporting legal doctrine into the minds of law students. The end goal is to produce students that are able to recite relevant rules and principles, and correctly apply them to legal problems. As James explains, while few teachers openly support the doctrinal approach, it persists because it benefits the legal 'expert' within the academic community and 'contributes to the legitimisation of law as a discrete highly prestigious field of expertise'.<sup>60</sup> The doctrinalist attitude towards CLE would likely be ambivalence, bordering on resistance. The doctrinalist would contend that a law student's time is better spent in the classroom learning the rules of the relevant legislation and cases, and any activity that takes time away from this endeavour is a distraction. Short clinical components of a law subject that is predominantly based on the transmission of doctrine might be tolerated, but only if the focus is teaching students to apply doctrine correctly.

### **D Vocationalism**

*Vocationalism insists that the emphasis should be upon the teaching of legal skills necessary to function effectively as a legal practitioner. The employable student expects that legal education should lead to legal employment.*<sup>61</sup>

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<sup>58</sup> See, for example, Bond University's 'Litigation Clinic' (LAWS13-574) in which students are required to 'adhere to the highest standards of professionalism, including a commitment to learning and working: a) autonomously, collaboratively and reflectively; and b) ethically and responsibly.

<sup>59</sup> See James, above n 3, 51–82 for a detailed explanation of Doctrinalism. See also Nickolas James, 'Expertise as Privilege: Australian Legal Education and the Persistent Emphasis Upon Doctrine' (2004) 8 *University of Western Sydney Law Review* 1.

<sup>60</sup> James, 'Expertise as Privilege: Australian Legal Education and the Persistent Emphasis Upon Doctrine' (2004) 8 *University of Western Sydney Law Review* 1, 2.

<sup>61</sup> See James, above n 3, 83–124 for a detailed explanation of Vocationalism. See also Nickolas James, 'Why Has Vocationalism Propagated so Successfully in Australian Law Schools?' (2004) 6 *University of Notre Dame Australia Law Review* 41.

Much has been said about the benefits of teaching legal skills to law students.<sup>62</sup> As stated previously, so-called 'integrated skills programs' have become the flagship for a number of law schools around the country.<sup>63</sup> The idea is that law students should learn to both '*think* like a lawyer and *do* like a lawyer'.<sup>64</sup> Research suggests that deeper levels of learning occur when students are actively involved in a process of constructing meaning and knowledge through involvement in a practical skills exercise as opposed to passively receiving information in a traditional lecture environment. The vocationalist attitude towards CLE is undoubtedly overwhelmingly positive. Those influenced by vocationalism typically assert that every law student should have the obligation, or at least the opportunity, to gain clinical experience during law school – the content of curricula 'must be governed by its occupational utility' and the employability of graduates must always be the paramount consideration.<sup>65</sup> CLE experts and commentators are almost all influenced primarily by vocationalism and contend that a diverse and accessible CLE program is the most authentic way to ensure that a law degree is teaching students how to be legal practitioners.

### **E Corporatism**

*Corporatism insists that law should be taught efficiently and profitably. Similar to the employable student, the marketable student expects that legal education be about making students attractive to employers.*<sup>66</sup>

Law school administrators have many factors to consider when deciding whether to approve a new elective subject, most of which are corporatist in nature. While corporatism is concerned with the utility of legal education, its main concern is the utility of the law school itself.<sup>67</sup> The relationship between teacher and student is perceived as one of service provider and consumer. The key question faced by law school administrators in this context is, 'are we providing a quality product?' Student demand for CLE is high, even in the more traditionally conservative law schools around the country. Accordingly, the majority of Australian law schools have introduced at least one clinical subject into their curricula and some have positioned extensive CLE programs as the centerpiece of their degree. The corporatist attitude towards CLE would likely be positive because clinical subjects make a positive contribution to the quality of the product provided by a law school. Put simply, popular elective subjects are good for business and there is now no second-guessing the increasing popularity of clinical experience amongst Australian law students.

<sup>62</sup> See, for example, John Wade, 'Legal Skills Training: Some Thoughts on Terminology and Ongoing Challenges' (1994) 5 *Legal Education Review* 173; Sally Kift, 'Lawyering Skills: Finding their Place in Legal Education' (1997) 8(1) *Legal Education Review* 43; Sharon Christensen and Sally Kift, 'Graduate Attributes and Legal Skills: Integration or Disintegration?' (2000) 11(2) *Legal Education Review* 207; Rachel Spencer, 'Teaching Legal Skills at Flinders – An Integrated Practical Legal Training Program' [2003] *Flinders Journal of Law Reform* 6; Tammy Johnson and Francina Cantatore, 'Equipping Students for the Real World: Using a Scaffolded Experiential Approach to Teach the Skill of Legal Drafting' (2013) 23 *Legal Education Review* 113; Jane Ching, 'Favourable Variations: Towards a Refreshed Approach for the Interviewing Classroom' (2015) 25 *Legal Education Review* 173; Katherine Curnow, 'More than the Rules: Using Pleading Drafting to Develop Lawyering and Transferable Skills' (2015) 25 *Legal Education Review* 203.

<sup>63</sup> See, for example, Bond University's 'Integrated Skills Program' <https://bond.edu.au/about-bond/academia/faculty-law/about-bond-law>.

<sup>64</sup> Charles Brabazon and Susan Frisby, 'Teaching Alternative Dispute Resolution Skills' in Charles Sampford, Sophie Blencowe, Suzanne Condlin (eds), *Educating Lawyers for a Less Adversarial System* (Federation Press, 1999) 156, 167.

<sup>65</sup> Nickolas James, 'More than merely work-ready: Vocationalism versus professionalism in legal education' (2018) 40(1) *University of New South Wales Law Journal* 186.

<sup>66</sup> See James, above n 3, 125–158 for a detailed explanation of Corporatism. See also Nickolas James, 'Power-Knowledge in Australian Legal Education: Corporatism's Reign' (2004) 26(4) *Sydney Law Review* 587.

<sup>67</sup> *Ibid.*

## **F Liberalism**

*Liberalism insists that the purpose of teaching law is the inculcation of liberal values. The ethical student expects that legal educators acknowledge the fact that many law graduates choose not to practice law by including the perspectives of other disciplines in their teaching.*<sup>68</sup>

Law is steeped in liberalism, a political philosophy or worldview founded on ideas of liberty and equality. The primary theme that best illustrates how CLE appears through the lens of liberalism is *social responsibility*. Liberalism softens its emphasis upon individual freedom by insisting upon the importance of social responsibility. Law students, as members of the broader community, should be taught the importance of thinking rationally and responsibly with respect to advocacy, consistent with the liberal ideal of promulgating moral integrity and responsible citizenship. The liberal attitude towards CLE would likely be positive, provided the emphasis is on pro bono practice, social justice and the inculcation of liberal values. Those influenced by liberalism might contend that CLE subjects should be designed to encourage intellectual rigour beyond doctrinal expertise and to contribute to the creation of cultured students that understand the relationship between law and politics, and appreciate the importance of embracing liberal democratic principles as part of their legal education. Practical learning objectives and activities should be supported by academic enquiry into broad foundational topics such as the rule of law, rights theory and jurisprudence.

## **G Radicalism**

*Radicalism insists that the purpose of teaching law is to contribute to social and political change. The activist student expects to be equipped with the knowledge and tools necessary to fight against the injustices perpetuated by law and legal institutions.*<sup>69</sup>

Radicalism represents the resistance against orthodox legal education discourses. Established social, political and theoretical dimensions of law (and law teaching) are challenged through the exploration of critical legal studies and a broad range of other unconventional socio-legal and political theories.<sup>70</sup> CLE can sit comfortably within this fragmented discourse if the design and delivery openly challenges law's position of privilege. For example, the propensity of radicalism to favour the perspective of the 'excluded other'<sup>71</sup> is evident if the primary focus of a CLE subject is defending the less fortunate and marginalised sections of the community against oppressive legal rules and norms. Those influenced by radicalism would likely contend that CLE subjects should always be structured to challenge the status quo, with emphasis upon the promulgation of social and political change. When this is achieved, CLE can be a great platform to equip students with the tools necessary to fight against the injustices perpetuated by law and legal institutions. When this is not achieved, radicals might assert that CLE subjects are simply another platform to train law students to be obedient productive workers in a conformist profession.

## **H Educationalism**

*Educationalism insists that law be taught in a way that facilitates student learning. The good student expects legal educators to teach in a manner consistent with contemporary education theory.*<sup>72</sup>

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<sup>68</sup> See James, above n 3, 159–200 for a detailed explanation of Liberalism. See also Nickolas James, 'Liberal Legal Education: The Gap Between Rhetoric and Reality' (2004) 1(2) *University of New England Law Journal* 163.

<sup>69</sup> See James, above n 3, 201–236 for a detailed explanation of Radicalism. See also Nickolas James, 'The Marginalisation of Radical Discourses in Australian Legal Education' (2006) 16 *Legal Education Review* 55.

<sup>70</sup> *Ibid.*

<sup>71</sup> James, above n 3, 237.

<sup>72</sup> See James, above n 3, 201–236 for a detailed explanation of Educationalism. Note that James originally used 'pedagogicalism' instead of educationalism. See also Nickolas James, 'How Dare You Tell Me How to Teach:

Educationalism insists that there is no good reason to separate legal education from any other form of education. That is, it should be conducted in a manner consistent with the ideas and insights developed within general education scholarship.<sup>73</sup> Being a legal expert is no longer the benchmark for teaching law; it is expected that one also strives to be an effective teacher. There is no doubt that the unique challenges faced by clinic students create an environment in which deep learning comes naturally. To fully capitalise on these opportunities, those influenced by educationalism would insist that the learning objectives, activities and assessment of CLE subjects be constructively aligned, and that performance criteria be clear, thorough and achievable. The common administrative dynamic of a clinic being *coordinated* by a law teacher and *supervised* by a legal practitioner might be problematic from an educationalist perspective because practitioners tend to be focused more on legal outcomes for clients than educational outcomes for students. In this context, the academic flavour of a CLE subject might be seen to be diluted by the desire (of both students and supervisors) to focus on the practical learning opportunities available. Educationalists would contend that the academic coordinator should remain involved in the onsite delivery of the subject wherever possible to ensure that students remain connected with the academic foundations of the relevant subject.

#### IV Conclusion

Answers to the fundamental questions regarding *how* law should be taught, *what* law should be taught, and what *outcomes* should be sought vary significantly. There is no single truth regarding the 'right way' to teach law, but rather a multitude of competing truths all fighting for dominance. An understanding of legal education discourse and the power-knowledge strategies employed by each gives law teachers a sense of objective clarity that can significantly improve their ability to fulfil their roles effectively. Indeed, one of the indirect purposes of this paper was simply to increase awareness of legal education discourse amongst those involved in the coordination and supervision of CLE subjects. Knowledge of legal education discourse is perhaps particularly useful for aspiring clinical educators in the sense that it arms them with useful weaponry should they encounter resistance to their new subject proposals. That is, by identifying the aspects of a proposed clinical subject's design that align with the ideological underpinnings of each individual discourse, one is better equipped to strategically adapt a proposal to suit the perceived discourse alignment of those responsible for assessing the proposal, which will almost always be corporatism.

The ongoing tension between the six legal education discourses should not be seen as a problem that needs solving. Rather, the competition for dominance that characterises the legal education landscape must be embraced and accepted for what it is. The examination of CLE through the lens of legal education discourse is intended to demonstrate some of the diverse ways in which legal educators might perceive CLE. One cannot assume that because CLE has become increasingly popular in recent years that it necessarily has the unqualified support of all legal educators. While it is widely accepted that clinics are a welcome addition to the law degree curricula, there are varied perspectives on the appropriate function and design of clinical subjects/programs and this paper has attempted to identify some of those perspectives. Moreover, this paper serves to confirm the widely accepted notion that CLE will continue to be an increasingly popular educational platform for Australian law students into the future. While each discourse fosters different ideas regarding the values and goals of law teaching, it has been argued that, with the possible exception of doctrinalism, CLE can address all of them in different ways.

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Resistance to Educationalism within Australian Law Schools' (2013) 36(3) *University of New South Wales Law Journal* 779.

<sup>73</sup> Ibid.